No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLOTTE LOUISE WILSON, individually, and as Personal Representative of the Estate of Darold Floyd Wilson, etc., and GAIL L. CLAY, individually, as Personal Representative of the Estate of Norman Lee Clay, etc.,

Petitioners,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY a corporation,

Respondent.

PETITION FOR A WRIT OF CERIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

1. Whether the Tenth Circuit Court of Appeals erred in determining because of "legislative acquiescence" and a balancing of equities in 1908, under the Federal Employer's Liability Act, 45 U.S.C., §§51-60, prejudgment interest may not be awarded as part of compensatory damages to the survivor of a railroad brakeman who drowned in a flash flood on the high plains of Colorado.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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JURISDICTION

The judgment of the Tenth Circuit Court of Appeals entered on October 10, 1986 affirming the trial court's denial of prejudgment interest. The Court of Appeals denied a timely motion for rehearing on November 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(l).

STATEMENT OF THE CASE

The Petitioner's husband, Norman Lee Clay, a brakeman employed by the Respondent, drowned on July 3, 1981, when his train plunged into Frijole Creek near Trinidad, Colorado during a flash flood. On November 14, 1983, the trial court entered its amended judgment in favor of the petitioner under the Federal Employer's Liability Act, 45 U.S.C. §§51-60, ("FELA"). *Order,* Appendix A, pp. 1a-3a. On March 29, 1984, the trial court denied the Petitioner's post-trial motion for prejudgment interest, citing the lack of any persuasive authority for such an award.

On November 29, 1984, the same trial judge, in a different case, relying primarily upon the authorities presented by the Petitioner, reversed himself and entered an award of prejudgment interest in a FELA case, *Garcia v. Burlington Northern Railroad Co.*, 597 F.Supp. 1304 (D. Colo. 1984). The court cited the obsolescence of the reasoning underlying extant precedent, the legislative intent of full compensation in the enactment of the FELA, currently prevailing equities and considerations of judicial efficiency as the basis for the grant of prejudgment interest.

On October 10, 1986, the Tenth Circuit Court of Appeals, in a divided opinion, affirmed the trial court's original finding of no authority for the grant of prejudgment interest in a FELA case. The majority opinion relied upon the doctrine of legislative acquiescence and a congressional balancing of equities in 1908.

> The omission by Congress in the FELA of such an express statement indicates to us that Congress did not intend to provide for prejudgment interest. Congress, in our view,

> reached a balance as to the many considerations before it on this then novel legislation and this we should not disturb.

Opinion, Appendix B, pp. 4a-9a. The minority opinion dissents from the majority ruling as to the non-availability of prejudgment interest.

> When the court nevertheless insists on resting its decision in the rubric of 'statutory interpretation,' the decision thwarts the open, analytical dialogue which should ensue from frank analysis of the issue's substantive merits.

Opinion, Appendix B, pp. 11a-11b. The minority opinion concurs in the result, however, because of the lack of expert testimony at trial concerning the "actual economic loss" of use of the money.

Opinion, Appendix B, p. 12a. The Court of Appeals denied the Petitioner's Petition for Rehearing on November 10, 1986. *Denial of Petition for Rehearing*, Appendix C, p. 14a.

WHY CERTIORARI SHOULD BE GRANTED

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE AWARD OF PREJUDGMENT INTEREST AS AN ELEMENT OF DAMAGES IN FELA CASES HAS NEVER BEEN PROSCRIBED OR PRESCRIBED BY THIS COURT, THE UNDERLYING RATIONALE FOR THE TENTH CIRCUIT'S OPINION BELOW PROSCRIBING PREJUDGMENT INTEREST HAS BEEN DISCREDITED BY OTHER OPINIONS OF THIS COURT AND THERE IS NO RATIONAL REASON FOR PROVIDING, UNDER FEDERAL LAW, DIFFERENT ELEMENTS OF "FULL COMPENSATION" TO SURVIVORS OF WORKMEN WHO DROWN ON THE HIGH PLAINS THAN TO SURVIVORS OF WORKMEN WHO DROWN ON THE HIGH SEAS.

This Court has never addressed whether prejudgment interest may be awarded as an element of damages in a FELA case. Since the Federal Employer's Liability Act, supra, was passed in 1908 almost every court below reviewing the issue held that consideration of prejudgment interest as an element of damages was not permissible in FELA cases based upon ancient precedents arising out of the common law aversion to prejudgment interest extant in 1908. The Tenth Circuit majority opinion below in proscribing this element of damages on the basis of "legislative acquiescence" and a perceived congressional freeze of relative equities between railroad employers and employees in the social and economic climate of 1908 contradicts the established precedent of this Court. Congress, in adopting the FELA, intended it to provide flexible remedies to assure liberal recovery for workers injured in dangerous employment by railroads.

> Congress saw fit to enact a statute of most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers . . . And it is also clear that Congress intended the creation of no static remedy, but one which would be developed to meet changing conditions and changing concepts of industry's duty toward its workers.

Kernan v. American Dredging Co., 355 U.S. 426, 432, 2 L.Ed.2d 382, 78 S.Ct. 394 (1958).

In *Rogers v. U.S.*, 322 U.S. 371, 373, 92 L.Ed.2, 68 S.Ct. 5 (1947), this Court refuted the legislative acquiescence doctrine as applied to prejudgment interest, holding that an award of prejudgment interest is predicate upon the congressional purpose underlying the statute in issue.

> The failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court . . . .

> And this Court has generally weighed these relative equities in accordance with the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained.

In *General Motors v. Devex Corp.*, 461 U.S. 648, 655, N.10, 76 L.Ed.2d 211, 103 S.Ct. 2058 (1982), this court recognized prejudgment interest to be an integral part of just compensation in a patent infringment case regardless of whether the damages are liquidated or unliquidated.

Courts can and will change the substantive "common law" of the FELA to meet contemporary needs and changed circumstances and to recognize the impact of present values of money and the impact of taxes.

> Because the prevailing practice, [of refusing instructions on the impact of federal income tax on the amount of damage awarded], developed at a time when federal taxes were relatively insignificant and because some courts are now following a different practice, we decided to answer the two questions.

Norfolk & Western R. Co. v. Liepelt, 444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755 (1980).

The impact of interest on contemporary society has changed radically since 1908. We now live in an interest sensitive and interest driven society, largely stimulated and controlled by monetary policy of the Federal Reserve Board, (created in 1913), which by

manipulating money supply and hence interest rates, can drastically alter the entire pattern of American and international economic life. In 1908 the federal debt was 1.1 Billion Dollars, and in 1981 it was One Trillion Dollars. Horvitz and Ward, *Monetary Policy and the Financial System*, Prentice-Hall 5th Ed. (1983), pp. 174-190. In 1981 consumer debt was 411 Billion Dollars and real estate secured debt was One Trillion Dollars. *Monetary Policy*, supra, pp. 156-158. The recent, enormous proliferation of easy credit sensitizes everyone today to the impact of interest charges. In January of 1984 there were issued and outstanding 350 million credit cards in the United States, each subject to monthly and usually premium interest charges. Cobleigh and Editors, *What Everyone Should Know About Credit*, U.S. News and World Report Books (1975), p. 79.

In 1908 small loan companies, personal finance companies and credit unions didn't exist. *Credit*, supra, pp. 39, 70. The typical terms for the financing of an automobile in 1915 were 40 percent down with the balance paid over 8 months. *Credit*, supra, p. 22.

The modern trend is to recognize that the award of prejudgment interest is compensation for the delay in the use of money and a necessary analog to the incorporation of the present value of money into the determination of pecuniary loss.

> It is both easier and more precise to discount the entire lost stream of earnings back to the date of injury—the moment from which earning capacity was impaired. The plaintiff may then be awarded interest on that discounted sum for the period between injury

> and judgment, in order to insure that the award when invested will still be able to replicate the lost stream.

Jones and Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 538, N.22, 76 L.Ed.2d 768, 103 S.Ct. 2541 (1983).

The trial judge below, after rendering his decision in this case reversed his position on prejudgment interest in FELA cases in his subsequent opinion in *Garcia v. Burlington Northern Railroad Co.*, 597 F.Supp. 1304 (D. Colo. 1984). In addition to noting the outmoded theoretical underpinnings of the no prejudgment interest rule, and the concepts of judicial efficiency justifying a change in the prevailing rule, the court stressed the fundamental equities supporting prejudgment interest.

> Granting prejudgment interest to prevailing FELA plaintiffs would promote fairness in two ways. First, full compensation to an injured worker requires compensation from the date of the injury. Following an injury, a worker incurs expenses immediately. Medical bills, loss of earnings, pain requiring medication, and the expense of supporting one's self and family present themselves. Rather, a seriously injured worker faces substantial, extraordinary expenses from the day of the injury, and often must borrow money at interest to pay them. Courts cannot go about the practical business of tailoring remedies to fit wrongs as if blindly oblivious to the obvious. In fact, courts have become part of the problem as our burgeoning caseloads and resulting delays have prolonged the priva-

> tions and heaped up the hardships inflicted on injured workers and their families.

Garcia v. Burlington Northern Railroad Co., supra, p. 1308.

It is anomalous that under admiralty jurisdiction geared, as is the FELA, to the full compensation of survivors, the families of workers who drown on the high seas receive more complete compensation than the Petitioner whose husband, Norman Lee Clay, drowned on the high plains of Colorado. Prejudgment interest is the rule rather than the exception in admiralty jurisdiction. *McCormack v. Noble Drilling Corporation*, 608 F.2d 169 (5th Cir. 1979). See, *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir. 1961), *cert. denied*, 368 U.S. 989 (1962), rejecting, in admiralty cases, the ancient precedent opposing prejudgment interest in personal injury and wrongful death cases.

The Petitioner respectfully requests this Court grant certiorari to the Tenth Circuit Court of Appeals to review that Court's denial of the availability of prejudgment interest in FELA cases and to consider the adoption of the reasoning later set forth by the trial judge in *Garcia v. Burlington Northern Railroad Co.*, supra.

Respectfully submitted this 6th day of February, 1987.

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 81-C-1385

CHARLOTTE LOUISE WILSON, *et al.*,
Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant.

FILED

MAR 29 1986

ORDER

In this Federal Employer's Liability Act case, several post-trial motions are pending with regard to the judgment entered in favor of the plaintiff Gail Clay against the defendant Burlington Northern Railroad Company. These motions have been thoroughly briefed, and oral arguments would not materially assist in deciding them.

Plaintiff has requested that I award pre-judgment interest, but has cited no persuasive authority supporting such an award. For this reason, I decline to award her pre-judgment interest. That motion is denied.

Plaintiff also has requested that I award post-judgment interest on the full amount of the amended judgment from the date the original judgment was entered. Defendant objects to this proposed award. Since my decision to amend the judgment simply removed the effect of the comparative negligence diminution of Clay's award, it held that she is

entitled to the full amount of damages found by the jury. Post-judgment interest should accrue on the full amount of $690,046.00 from the date of the initial judgment, June 10, 1983. My order dated November 14, 1983, which restored the full amount of the jury verdict, should have indicated that the amended judgment be entered *nunc pro tunc* to June 10, 1983. Pursuant to Fed. R. Civ. P. 60(a), I now order that the judgment entered November 15, 1983 be amended to reflect that such judgment was to be effective *nunc pro tunc* to June 10, 1983.

Therefore, the Clerk of the Court shall enter an amended judgment in favor of the plaintiff Clay and against the defendant in the amount of $690,046.00, *nunc pro tunc* to June 10, 1983. Interest at the applicable rate shall accrue from June 10, 1983 on the full amount of the judgment.

Plaintiff also has requested that I require that any supersedeas bond filed by the defendant in support of a Fed. R. Civ. P. 62(d) stay be in an amount sufficient to cover the full amount of the judgment as well as any interest awarded. Of course, under Rule 62 (d) no stay is effective until I approve the bond. In order to expedite matters, I will now state that I will not approve any supersedeas bond unless it is sufficient to secure the full amount of the $690,046.00 judgment, plus interest at the statutory rate from June 10, 1983 until March 31, 1986. The Court of Appeals' crowded docket, together with the recent statements by the Chief Justice of the United States describing the increasing work load of the courts of Appeals, indicate that the prudent course is to estimate two years on appeal.

Finally, the parties have submitted cross-motions for Fed. R. Civ. P. 54(b) certification of the plaintiff Clay's judgment against the defendant. Pursuant to that rule, I find that there is no just reason for delay and I direct the Clerk of the Court to enter as a final judgment the

amended judgment specified in this order. The parties may pursue an appeal from this final amended judgment.

Dated at Denver, Colorado, March 29, 1984.

BY THE COURT:

/s/ JIM R. CARRIGAN
JIM R. CARRIGAN, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX B

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

84-1536

CHARLOTTE LOUISE WILSON, individually, as Personal Representative of the Estate of DAROLD FLOYD WILSON, and as Guardian of JOLENE KAY WILSON, CRAIG ALLEN WILSON and JERRY TODD WILSON;

Plaintiff,

GAIL L. CLAY, individually, as Personal Representative of the Estate of NORMAN LEE CLAY, and as Guardian of KARRI LYNN CLAY and BOYD LEE CLAY,

Plaintiff-Appellant,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellee.

FILED
OCT 10 1986

Appeal From The
United States District Court
For The District of Colorado
(D.C. No. 81-C-1385)

Gregory R. Piche' of Spurgeon, Haney & Howbert, Professional Corporation, Colorado Springs, Colorado, for Plaintiff-Appellant.

Albert J. Givray (C. William Kraff, III, John L. Pilon and James P. Gatlin, on the brief), Denver, Colorado, for Defendant-Appellee.

Before McKAY, SETH and TIMBERS,* Circuit Judges.

SETH, Circuit Judge.

Plaintiff-appellant, Gail Clay, appeals the denial by the district court of her motion for prejudgment interest in an action for wrongful death brought under the Federal Employer's Liability Act, 45 U.S.C. §§ 51-60. The trial court denied Mrs. Clay's motion noting appellant's failure to cite any persuasive authority supporting such an award. We agree.

The facts giving rise to this action are as follows. Appellant's husband, Norman Clay, who was a brakeman on the Burlington Northern Railroad, was killed on July 3, 1981 in a train accident caused by a bridge washout. Appellant brought this wrongful death action in the United States District Court for the District of Colorado under 45 U.S.C. § 51. On November 14, 1983 the trial court entered an amended judgment pursuant to a jury verdict in favor of appellant in the amount of $690,000. Pending a retrial of a co-plaintiff's action which was also ordered by the court, Mrs. Clay moved for an award of prejudgment interest. After denying appellant's motion, the district court certified the judgment for appeal to this court. The only issue presented by appellant is whether prejudgment interest may be awarded in actions arising under the Federal Employer's Liability Act, 45 U.S.C. § 51.

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* Honorable William H. Timbers, United States Circuit Judge for the Second Circuit, sitting by designation.

It seems that although this question is a novel one for this court and the United States Supreme Court has yet to consider it, this same issue has been considered in other circuits. The result of our review of those previous cases, ever since the FELA was enacted almost 80 years ago, indicates a unanimous conclusion that Congress did not intend to provide prejudgment interest under the FELA. *See e.g.*, Lindsey v. Louisville & Nashville Railroad Co., 775 F.2d 1322 (5th Cir.); Kozar v. Chesapeake and Ohio Railway Co., 449 F.2d 1238 (6th Cir.); Powers v. New York Central Railroad Co., 251 F.2d 813 (2d Cir.); Chicago, Milwaukee, St. Paul and P. Ry. Co. v. Busby, 41 F.2d 617 (9th Cir.).

Reference to the statute itself in order to resolve this issue is of limited assistance. The FELA is silent on the issue of prejudgment interest or any type of interest. The only federal statutory provision on the recoverability of interest in general is 28 U.S.C. § 1961 which "relates only to interest recoverable on a judgment itself. It has nothing to do with the question of whether prejudgment interest shall be allowed *as part of the compensation awarded to make the injured party whole.*" Louisiana & Arkansas Railway Co. v. Export Drum Co., 359 F.2d 311, 317 (5th Cir.) (emphasis in original). In Rodgers v. United States, 332 U.S. 371, the Supreme Court directed consideration in such instances to the federal statute controlling the action and the underlying congressional purpose. 332 U.S. at 373-74.

Both parties agree that at the time of its enactment in 1908 the FELA was a radical departure from the common law duties owed an employee by his employer. By eliminating many common law defenses any one of which could defeat an injured employee's action, Congress insured that workers would be compensated for injuries resulting from railroad negligence. And, as appellant points out, these sweeping departures from the established common law are evidence of a "general congressional intent . . . to provide liberal recovery for injured workers . . . ." Kernan v.

American Dredging Co., 355 U.S. 426, 432. However, it is another matter to imply from certain of Congress' express departures from the common law in 1908 a legislative intention that then equally radical departures be later made by judicial fiat.

In light of the observation earlier that the FELA represented a radical departure from the common law in a number of different respects it is useful to recall that at that time the common law most uniformly rejected the imposition of prejudgment interest. *See* Burrows v. Lownsdale, 133 F. 250 (9th Cir.); Missouri & Kansas Telephone Co. v. Vandervort, 79 P. 1068 (Kan.). This court finds some indication of legislative intent in Congress' failure to expressly abrogate that principle in passing the FELA when it did so to other well established doctrines. The omission by Congress in the FELA of such an express statement indicates to us that Congress did not intend to provide for prejudgment interest. Congress, in our view, reached a balance as to the many considerations before it on this then novel legislation and this we should not disturb.

Appellant contends that this failure to specifically address the matter when combined with the already mentioned overall intention of the FELA to provide liberal recovery to injured workers is evidence of an intention by Congress to allow federal courts to implement such remedies as necessary. In support of appellant's petition to now implement in FELA cases the additional remedy of prejudgment interest she cites the "dramatic and extraordinary" change regarding the importance of interest in our modern society. Additionally, appellant contends that the imposition of prejudgment interest would greatly reduce trial delays thereby improving court efficiency and, finally, that the application of interest to the judgment from the date of injury would more accurately compensate injured workers for their loss.

This court does not intend to unduly discount the obviously significant impact which interest and other determinants of the time value of money have on our modern economy. However, we are not in a position to assess the degree to which the heightened importance of interest has been either "dramatic" or "extraordinary." As mentioned earlier in this opinion the notion of interest and the time value of money was not an alien concept to Congress in 1908. We cannot assume an intention on the part of Congress that the federal judiciary should implement the additional remedy of prejudgment interest when the courts subjectively determine that the prime rate has attained a "dramatic" or "extraordinary" level. Further, in the context of the FELA where Congress has crafted a then unique scheme of compensation separate from the common law we are hesitant to impose another remedy against the employers which may alter the nature of the congressionally determined employer-employee relationship. Accordingly, it seems that the awarding of prejudgment interest under the FELA by federal courts pursuant to their "equitable powers" is an inappropriate method of imposing a remedy not granted by Congress. The Jones Act is not of help on this point.

In addition to being susceptible to the same criticism as above, appellant's additional contentions of reducing trial delays and more accurately compensating plaintiffs for their injuries present infirmities of their own. The increasing length of trial delays is a regrettable reality and may be a sign of the times much as is the influence of interest rates. However, although no doubt the delays are to some extent the fault of the specific parties to an action, it is impossible to attribute the entire blame for such delays upon the defendant. Moreover, the length of trial delays seems as closely related to the size of the burgeoning civil docket in federal court. Even assuming that allowing prejudgment interest would effectively reduce the length of

trial delays we don't think it is a sufficient reason to here reach a different conclusion.

Appellant's contention that prejudgment interest would more accurately compensate injured workers by recognizing the worker's deprivation during the period from injury to judgment itself presents another reason counseling hesitation in this matter. Obviously the damages awarded to a successful plaintiff represent a composite of a number of different elements. Not all of these elements are properly to be considered for prejudgment interest and whether any one of these various components should be included and how they are to be separated is more properly a consideration for Congress.

Indeed, appellant has presented numerous reasons in support of her petition for prejudgment interest, arguments which the court feels may be more effective when directed at another branch of the federal government. Congress itself may be persuaded to change its initial determination on prejudgment interest. However, this court is not sufficiently enamored with the arguments proffered by appellant to lead us to depart from nearly 80 years of precedent consistently interpreting the FELA as not permitting prejudgment interest. Although looking to congressional action or inaction in the face of subsequent developments in society and the common law is usually ambiguous assistance at best, in this instance there seem to be no indications that Congress has swayed from its initial determination to not permit prejudgment interest in FELA cases.

Accordingly, the order of the district court denying appellant's motion for prejudgment interest is AFFIRMED.

No. 84-1536—CHARLOTTE LOUISE WILSON and GAIL L. CLAY v. BURLINGTON NORTHERN RAILROAD CO.

MCKAY, Circuit Judge, concurring:

The legislative mandate in these FELA cases is simple—fully compensate the injured employee for her losses. As any novice finance student knows, no loss is more fundamental or easily understood than the loss of the use of money over time. The ominous burden of interest on the National debt and the enormous collective profitability of our myriad financial institutions are glaring reminders of that simple, economic fact. Congress itself recognized in 1984 the potentially immense value of money over time when it prohibited premature, undiscounted tax deductions for future liabilities, thereby increasing revenues by an expected $209 million. Prior tax accounting rules "[had] not been grounded in economic reality . . . ." Jensen, *The Deduction of Future Liabilities by Accrual-Basis Taxpayers: Premature Accruals, the All Events Test and Economic Performance,* 37 U. Fla. L. Rev. 443, 448 (1985).[1]

The interest foregone on lost income or on money spent for out-of-pocket expenses from the date of loss to the time of compensation is as much a part of making an injured party whole as is the calculation of her wage rate. Nothing in the statutory scheme or in the history of its enforcement suggests an adequate reason why the courts should not, however tardily, carry out this part of the legislative mandate to make injured plaintiffs whole. Even the majority concedes that the FELA constituted a "radical" and "sweeping" departure from prior law, greatly liberalizing the injured employee's ability to recover. The courts have long recognized the general principle in a man-

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[1] For an exhaustive list of recent authority discussing the potential abuses that can arise when the time value of money is not considered, *see id.* at 445 n.11.

ner biased in favor of defendants by requiring that awards for future losses be discounted to present value. *St. Louis Southwestern Railway Co. v. Dickerson,* 105 S. Ct. 1347, 1348-49 (1985). Over and above sound, simple calculation of true economic recompense, equity demands that this disparity be corrected.

The majority misperceives the judicial function when it concludes that, without evidence of legislative intent, it is improper to award prejudgment interest "by judicial fiat." The majority would concededly find an award of prejudgment interest under FELA appropriate if, but only if, it could glean that the legislature intended such an award; if the statute is silent and Congress fails to intervene, the court may not act. But as the court itself notes, "looking to congressional action or inaction in the face of subsequent developments in society and the common law is usually ambiguous assistance at best." More to the point, however, the judiciary's hands are *not* tied, and should not be tied, when Congress fails to explicitly delineate its "intent" with respect to an issue such as prejudgment interest. "[A]ny principle that effectively removes judicial ability to make rules because of a preference for legislative rulemaking does not leave us with a workable system." Field, *Sources of Law: The Scope of Federal Common Law,* 99 Harv. L. Rev. 881, 934 (1986).

Moreover, in most instances, such fine, interpretational distinctions are illusory, since Congress most likely never contemplated the particular issue under consideration. In such cases, "interpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative advertence to the issue at hand attenuates." *Id.* at 894 (quoting P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System,* 770 (2d ed. 1973)). When the court nevertheless insists on resting its decision in the rubric of "statutory interpretation" and "congressional intent," the decision thwarts the open, analytical dialogue which should ensue from frank

analysis of the issue's substantive merits. As one commentator argues, "Rather than always being bound by the positive commands of a statute's words or professing adherence to undefinable concepts of legislative intent or purpose, courts [should] explicitly reason from and develop statutory principles in the tentative, incremental fashion of the common law." Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court,* 95 Harv. L. Rev. 892, 913 (1982) (footnotes omitted). It is when a court rigorously engages in thoughtful analysis in the face of legislative silence, rather than surmise chimerical legislative "intent," that it best fulfills its deliberative function and best serves to further the evolution of the law.

Even an application of the majority's "legislative intent" should lead to the result I urge. Congress intended full economic recompense. Like all damage awards, Congress has willfully left that determination to the particular case based on the evidence even where some element (such as present value of future awards) lends itself to a broad rule that does not require reestablishment in each case—only specific application. It is, therefore, not "legislating" or a misapplication of function for courts to do what they have always done—unless expressly forbidden by legislation—shape damage awards from sound principles and specific evidence.

I concur rather than dissent solely because the plaintiff, while creative in attacking such a long-entrenched error, has failed properly to present evidence to support a sound award of this aspect of her real economic loss. First, the required calculations are more sophisticated than mere application of current interest rates to the entire award from the date of injury to the date of compensation. Plaintiff should have presented testimony of her actual economic loss as well as expert economic testimony with respect to the appropriate interest calculation under, for example, Future Value Annuity Tables. These tables reveal the value

of consecutive deposits of $1 at regular intervals using various interest rates, reflecting the total's growing amount over diminishing time. In essence, the calculation is the inverse of the process of reducing future damages to present value, and the expert testimony required is analogous.

Second, I take the view that in all cases an award of prejudgment interest would require the segregation of economic losses from pain and suffering and punitive damages where these awards are recoverable. Neither of the latter two measures represent, strictly speaking, an economic loss to the plaintiff, and thus an award of foregone interest on these amounts would be inappropriate. Pain and suffering is a sentimental award which has been engrafted onto awards for economic loss through common-law evolution. The jury or court award of this amount is merely the reduction of that sentimental value to dollars at the time of judgment and does not in any real or analytical sense represent the return of the loss of the use of money. The same is true of punitive damages which perform a penal function and have no element in them of the return of deprived market value.

In all properly presented cases, so long as not expressly forbidden by clear, legislative mandate or private agreement, I would always award prejudgment interest on the amount of proven economic losses incurred prior to the date of judgment. Since we are here faced with a general verdict not properly segregated into its component parts, that task is now impossible. Plaintiff failed to timely present the matter based on sound testimony and proper instructions or interrogatories and must bear the burden of that failure. I would therefore affirm, but not for the reasons given by the court.

APPENDIX C

Case No. 84-1536

SEPTEMBER TERM—November 10, 1986

Before Honorable William J. Holloway, Jr., Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Honorable Oliver Seth and Honorable William H. Timbers.

CHARLOTTE LOUISE WILSON, individually, as Personal Representative of the Estate of Darold Floyd Wilson, and as Guardian of Jolene Kay Wilson, Craig Allen Wilson and Jerry Todd Wilson;

Plaintiff,

v.

GAIL L. CLAY, individually, as Personal Representative of the Estate of Norman Lee Clay, and as Guardian of Karri Lynn Clay and Boyd lee Clay,

Plaintiff-Appellant,

v,

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellee.

On consideration off appellant's petition for rehearing the same is denied by the panel who decided the appeal. Judge McKay would grant rehearing.

No active judge of the Court having requested en banc consideration, the suggestion for rehearing en banc is denied.

Judge Seymour did not take part in consideration of the suggestion for rehearing en banc.

ROBERT L. HOECKER, clerk

By: /s/ _____
Patrick Fisher, Chief Deputy Clerk